SINGAPORE REPORT

LIM SENG CHUAN v. PUBLIC PROSECUTOR

[C.C.A. (Wee Chong Jin C.J., Chua and Tan Ah Tah JJ.) November 14, 1975]

[Singapore — Criminal Appeal No. 6 of 1975]

Criminal Law and Procedure — Charge of murder — Evidence — Cautioned statement to a police officer — Admissibility of — Evidence given during trial within a trial — Whether trial judges were right in taking into account such evidence during trial proper.

Criminal Law and Procedure — Trial — Trial within a trial — Evidence.

Evidence — Trial within a trial — Relevant and admissible.

The appellant was charged with the murder of a 13-year-old girl whose body was found naked below the waist on the ground floor of a Housing and Development Board flat in Geylang Bahru, Singapore. The uncontradicted medical evidence given at his trial established beyond doubt that this girl had been sexually assaulted by a male person and manually strangulated before she was thrown from some height by the same person on the pavement of the block of flats. The prosecution sought to prove by circumstancial evidence that the appellant was the man in question as there being no direct evidence. In addition to this, the prosecution attempted to prove a cautioned statement that the appellant had made to a police officer at the CID. As the defence objected to the admissibility of the cautioned statement, the trial judges, who were sitting throughout without a jury, proceeded to hear evidence to decide its admissibility, the sole issue being whether or not the cautioned statement was made because of any threats, inducement or promise proceeding from the police. These proceedings by the trial judges to decide on the admissibility of cautioned statements as well as confessions have been termed a "trial within a trial" and it has always been the invariable practice during a "trial within a trial" to lead only such evidence as is material to the issue of admissibility. In this case, the practice was not followed in that a witness one Tan Huan Piaw was called to give evidence during the "trial within a trial" where he related a conversation he had with the appellant at the CID on the day when the cautioned statement was made. What the appellant said to Tan Huan Piaw was not material on the issue of the admissibility of the cautioned statement but it was relevant evidence and *prima facie* admissible evidence as to the guilt of the appellant on the murder charge because the appellant was alleged to have admitted to Tan Huan Piaw that he was involved in the death of the girl. After the case was concluded, the trial judges found the appellant guilty of murder and in their grounds of judgment, it was clear that they relied on the evidence of Tan Huan Piaw on the issue of whether or not the appellant had committed the murder of the girl.

The question before the Court of Criminal Appeal was whether the trial judges had erred in taking into account the evidence given by Tan Huan Piaw during the "trial within a trial" in considering whether or not the appellant was guilty of murder as charged.

Held: (1) fairness to the accused, which is a fundamental principle of the administration of criminal justice, requires that the "trial within a trial" ought to be considered a separate or collateral proceeding as (a) Evidence may be given at a trial within a trial which is inadmissible on the charge against the accused but may be relevant on the issue to be decided at the trial within a trial. It would therefore be grossly unfair if the true principle is that the evidence is before the court for all purposes; (b) conversely, evidence may be given at the trial within a trial which may be relevant and admissible on the charge but not relevant on the issue to be decided in the trial within a trial and the accused or counsel might well decline to challenge such evidence in the justifiable belief that it could not adversely affect the accused on the issue to be decided at the trial within a trial;

(2) as the trial was unsatisfactory, the conviction should not be allowed to stand and a retrial should be ordered.

Cases referred to:-

(1) *R.* v. *Amo and Amuna* [1963] Papua and New Guinea Law Reports 22.

(2) *R.* v. *Reynolds* [1950] 1 K.B. 606.

(3) *R.* v. *Smith* 19 C.L.R. 629.

COURT OF CRIMINAL APPEAL.

R. Joethy (*Choo Si Sen* with him) for the appellant.

Glenn Knight for the Public Prosecutor.

Wee Chong Jin C.J. (delivering the judgment of the Court): On the morning of July 1, 1974 the dead body of a 13-year old girl, naked below the waist, was found lying face up on the pavement of a Housing and Development Board 12-storey block of flats known as Block 14, Geylang Bahru, Singapore. The autopsy revealed that she had multiple abrasions on the right side of the body, fractures at the angles of the 6th, 7th and 8th right ribs with no extravasation at these fractures, comminuted fractures on the posterior halves of both parietal bones and the superior portion of the occipital bone. The parieto-temporal sutures, the sagittal sutures and the occipito-temporal sutures were widely separated. The fractured lines continued into the base of the skull. The autopsy also showed that she had petechiae or haemorrhagic spots on the face, inside the mouth at the throat and on the upper part of the neck with frothy mucous at the nostrils and the respiratory tract. At the middle portion of the neck there was a very pale area in contrast to the haemorrhagic areas on the upper part of the neck.

The pathologist who performed the autopsy certified strangulation as the cause of her death. He gave evidence at the trial of the appellant who was charged with her murder. He said he went to the scene and examined the body of the deceased. He found all the joints were stiff, the face and upper part of the neck showed haemorrhagic spots, heavily blood-stained frothy fluid in the nostrils and at the mouth. He checked her external genitalia and found no injuries but nevertheless he took smears from the area between the vagina and the anus and from the vagina behind the hymen. The next day he performed an autopsy on her. In his evidence he expressed the opinion that she had been manually strangulated and that the fractures of the skull and the ribs were post-mortem fractures and were consistent with injuries sustained as a result of a fall from some height. He said he examined the smears taken from the vagina and found several sperms which indicated that a male organ had come into contact with the vagina and had emitted seminal fluid.

No one saw how the deceased came to be in the position she was when she was seen on the pavement of Block 14 and no one saw what caused the injuries as earlier described. Nonetheless the uncontradicted medical evidence established beyond doubt that she had been sexually assaulted by a male person and manually strangulated before she was thrown from "some height" by the same male person and that she was thrown from one of the Block 14 flats which overlooked the pavement where she lay dead. The multiple abrasions on the right side of the body and the fractures of three right ribs were strong evidence that she landed on the right side of her body.

Apart from the medical evidence, the prosecution led evidence, substantially undisputed, which proved the following facts namely: —

Block 14, Geylang Bahru is a block of flats built by the Housing and Development Board comprising a ground floor and eleven other floors. On each of the eleven floors there are 28 flats with a common corridor running between two rows of flat, there being 14 flats on each side of this corridor. These flats have a number suffixed with a letter of the alphabet. The flats on the first floor carry the suffix "A", those on the second floor the suffix "B" and so on until the twelfth and top floor where the flats have the suffix "L".

The deceased girl lived with her mother in Flat 1039-C on the third floor of the block. The appellant lived with his wife on the third floor in Flat 1031-C which is on the same side of the corridor. These two flats are separated from each other by another flat numbered 1035-C and a staircase. Directly opposite the appellant's flat on the other side of the common corridor is Flat 1029-C in which lived a married woman, Saleha binte Shaik Omar. On the day of the alleged offence, the appellant's wife was at work in a factory but the appellant, who was unemployed, was at home.

On each floor, two adjoining flats share a common rubbish chute which also serves two corresponding adjoining flats on each of the other floors of the block. Each chute thus serves 11 floors and 22 flats. Rubbish thrown from any of the 22 flats into the common chute which serves them empties into a large rubbish bin situated in a small locked cubicle on the ground floor. Every morning the loaded rubbish bins are removed and replaced by empty ones. Flats bearing the common serial number 1031 share a common rubbish chute with flats bearing the common serial number 1035.

A police photographer who was the first police officer to arrive at the scene saw the body of the girl lying on the pavement in line with the 11 flats bearing the common serial number 1031. He examined the large rubbish bin which served these 11 flats together with the adjoining 11 flats which bear the common serial number 1035, and found inside it a pair of slacks and panties and other articles which the girl was wearing on the morning of her death.

The girl's body was lying on the pavement almost directly below and with her legs towards the bedroom windows of the 11 flats which had the common serial number 1031. The photographic exhibits, particularly "P1", also showed that these bedroom windows were adjoining to the eleven bedroom windows of the 11 flats which had the common serial number 1027 with about two feet separating each set of adjoining windows.

Of the 11 flats with the common serial number 1031, four were untenanted on the day the girl died and they were locked and the keys kept by the Housing and Development Board, the owners of Block 14. These four flats are on the first, fourth, sixth and eighth floors. Another flat, No. 1031-E on the fifth floor, although let had not yet been occupied by the tenant who was in the process of moving into it. Of the remaining six flats, three of them had permanent grills fixed to their bedroom windows and these three flats were Flats Nos. 1031-B, 1031-J and 1031-L on the second, ninth and eleventh floors respectively. The remaining three flats were the appellant's Flat 1031-C on the third floor, Flat 1031-G on the seventh floor and Flat 1031-K on the tenth floor and the bedroom windows of these three flats had no grills. Flat 1031-G was tenanted by a Madam Aw Boon Ching. That morning she heard from her seventh floor flat a loud thud and, looking out of her bedroom window, she saw on the pavement below, the body of a person lying face up. Flat 1031-K was occupied by a Mohamed Rashid. It was his off-day that morning and he was at home with his wife and sometime past 10.30 a.m., on hearing a commotion coming from the ground floor, he looked out of his window and saw a large crowd gathered round the body of a person.

There was no evidence in respect of the occupation on the material day of the 11 flats with the common serial number 1027, the bedroom windows of which adjoined the bedroom windows of the 11 flats with the common serial number 1031 nor was there any evidence that all these bedroom windows had grills to them. However, it is clear from the evidence that the 11 flats with the common serial number 1027 did not share a common rubbish chute with the 11 flats with the common serial number 1031.

At some time past 9 a.m. that morning Saleha binte Shaik Omar spoke to the girl who was playing on the landing of the staircase on the third floor. As she was about to enter her flat she also spoke to the appellant, who was at the door of his flat. The appellant at that time was wearing a short sleeved shirt, blue shorts and slippers. Later that morning when she was informed by someone that a person had committed suicide she came out of her flat and again saw the appellant outside his flat dressed in a long sleeved shirt and long trousers. Then she saw some police officers who entered with the appellant into his flat. She followed and looking out of the kitchen window of the appellant's flat she saw part of a covered body lying on the pavement below. She asked the appellant what had happened and he told her that a girl had been murdered and thrown down. Later after the police had left she again spoke to the appellant in the corridor and was told by him that he knew nothing about the matter as he was having a bath at the time and had gone down to the ground floor when he heard a commotion.

The prosecution attempted to put in evidence a cautioned statement made by the appellant to a police officer at the C.I.D. As the defence objected to its admissibility the trial judges, who were throughout sitting without a jury, proceeded to hear evidence to decide on the question of admissibility. The sole issue as to the admissibility of the cautioned statement was whether or not it was made because of any inducement, threat or promise proceeding from the police.

Where evidence is led before a court for it to decide whether or not a cautioned statement or a confession should be admitted as evidence against an accused person, the proceedings during which such

evidence is led and heard by the court has invariably been termed "a trial within a trial" by our courts. Furthermore, it has always been the invariable practice during a trial within a trial to lead only such evidence as is material to the issue of admissibility. In the present case the invariable practice was not followed in the case of a witness, Tan Huan Piaw, whom the prosecution called during the trial within a trial. We set out the following extract from the Verbatim Shorthand Notes: —

"Choor Singh J. : ... On the issue of admissibility do you require [Tan Huan Piaw]?

D. P. P. : Yes, because of the allegations that have been made. My Learned Friend in the Lower Court has made an allegation of interference by prosecution, so I don't want it to be said that there was a witness whom an allegation had been made against, whom we do not want to call as such. On the admissibility of the cautioned statement, I think even on the evidence as it stands, I am prepared to leave it at that.

Choor Singh J. : You must make up your mind whether you want to call him and then complete your case on the issue of admissibility, or you are going to do without him. The decision must be yours.

D. P. P. : My Lord, but I would like to call him so that I can complete my case and there will be no bits and pieces left out.

Choor Singh J. : If you would like to call him, the solution would be to adjourn and try and find him.

D. P. P. : My Lord, the witness has just arrived.

Choor Singh J. : Very good, let us carry on with him."

In his evidence during the trial within a trial Tan Huan Piaw related a conversation he had with the appellant at the C.I.D. on the day when the cautioned statement was made. It is clear beyond doubt that what the appellant said to Tan Huan Piaw was not material on the issue of admissibility of the cautioned statement but it was relevant evidence and *prima facie* admissible evidence as to the guilt or otherwise of the appellant on the murder charge because during that conversation the appellant is alleged to have admitted to Tan Huan Piaw that he was involved in the death of the girl by throwing her unconscious body, in desperation, through the window.

After hearing Tan Huan Piaw's evidence and the submissions of counsel on the admissibility issue, the trial judges ruled the cautioned statement to be inadmissible. After the ruling, the Deputy Public Prosecutor, when asked whether he had any other witnesses for the prosecution on the murder charge, indicated that he had none and closed the prosecution's case against the appellant.

The appellant elected to give evidence in the witness box where he gave a short account of his movements on the morning of the girl's death. He denied in cross-examination that he had told Saleha he was having a bath when he heard a commotion on the ground floor. He denied he had told Tan Huan Piaw he had thrown the unconscious girl out of the window, claiming that Tan Huan Piaw was his enemy. The trial judges found the appellant guilty of murder. In their Grounds of Judgment they said Tan Huan Piaw impressed them as a truthful witness and was speaking the truth when he stated that the appellant told him that the appellant had flung the girl through the window. The trial judges described this admission as "the very damaging evidence given by Tan Huan Piaw against the [appellant]". The trial judges also said they were convinced that the appellant was not speaking the truth and they rejected his claim that he had nothing to do with the death of the girl. However, the trial judges also said that in their judgment, even without the evidence of Tan Huan Piaw, there was sufficient circumstantial evidence which convinced them beyond any reasonable doubt that it was the appellant who had strangulated the girl to death and had thrown her out of his bedroom window.

Having regard to the evidence and the defence raised the only disputed issue was whether the appellant was the male person who had murdered this defenceless young girl. It seems to us, if Tan Huan Piaw had testified during the trial proper, and not during the trial within a trial, and if the trial judges did not err in their acceptance of him as a credible witness and of his evidence then the present appeal must fail.

The question is whether the trial judges were correct in taking into account the evidence given by Tan Huan Piaw during the trial within a trial when considering whether or not the appellant was guilty of murder as charged. Our attention has not been drawn and we are not aware of any binding authority on this question. There is no specific provision in the Criminal Procedure Code with regard to the practice and procedure to be adopted when a cautioned statement or a confession is challenged on the ground of inducement, threat or promise made by a person in authority. There are no local or English decisions directly in point but we have been referred to a decision of the Supreme Court of the Territory of Papua and New Guinea, *R.* v. *Amo and Amuna*[1] which is relevant.

In *R.* v. *Amo and Amuna* the accused were tried for murder before Mann C.J. sitting without a jury. The prosecution sought to put in evidence statements made by them to a police officer and in the course of his written ruling after hearing evidence as to their admissibility he dealt with the question whether in principle such evidence is before the court for all purposes or merely for the purpose of deciding the admissibility or otherwise of the statement or statements. After referring to the judgment of Goddard C.J. in *R.* v. *Reynolds*[2] and to *R.* v. *Smith*[3] Mann C.J. said at p. 27: —

"Translating these principles to the situation in the Territory where there is no jury, I think that it is not possible to say that certain evidence is before a Judge for one purpose and not another. I think that therefore evidence called on a *voire dire* is before the court for all purposes. I had previously thought that the situation could be met in such a case, to this extent, that if a judge came to the conclusion that a confession was not admissible, he could strike out from the record any evidence relating to the confession, including any evidence given as on a *voire dire*, but it now seems to me that this is not possible, and that it must appear on the record that certain evidence was tendered and rejected, and that the evidence upon which that decision is based must be on the court record and before the court.

It appears to me, therefore, that the expression *voire dire* has no effect such as has been suggested. The words *voire dire* appear to have been adopted in practice from the early form of oath administered on these occasions in a wide variety of cases, and the only reason for giving the procedure a name appears to be to signify that the court is embarking on an inquiry, which is not necessarily based on any issue between the parties, and may be of the court's own motion.

It seems to me that I am not at liberty to depart from the proper course of a trial simply on the ground that the accused may be in a less favourable position if I do not do so."

With respect, we are unable to accept the views expressed by Mann C.J. It seems to us that fairness to the accused, which is a fundamental principle of the administration of criminal justice, requires that a trial within a trial ought to be considered a separate or collateral proceeding. In the course of a trial within a trial evidence may be given which would be inadmissible evidence on the charge against the accused but may be relevant on the issue to be decided at the trial within a trial. In such a situation it would be grossly unfair to the accused if the true principle is that evidence called at a trial within a trial is before the court for all purposes.

Conversely, in the course of a trial within a trial evidence may be given which may be relevant and admissible evidence on the charge against the accused but would not be relevant on the issue to be decided at the trial within a trial. In such a situation the accused or his counsel might well decline to challenge such evidence in the justifiable belief that it could not adversely affect the accused on the issue to be decided at the trial within a trial.

We are fortified in the opinion we have just expressed having regard to the evidence given by Tan Huan Piaw at the trial within a trial in the present case, his perfunctory cross-examination by the appellant's counsel and the reliance by the trial judges of the admission by the appellant to Tan Huan Piaw that he had in a moment of desperation flung the girl out of the window. If Tan Huan Piaw had related this admission as a prosecution witness at the trial proper it would have been highly improbable, having regard to the appellant's defence, that he would not have been severely cross-examined as to his credibility. The admission was totally irrelevant to the issue which the trial judges had to decide at the trial within a trial.

For all these reasons we were of the opinion at the conclusion of the appeal that the trial was unsatisfactory and that the conviction ought not to be allowed to stand. We ordered a re-trial as we considered that was the proper course to adopt.

Re-trial ordered.

Solicitors: *Tang & Tan.*

A MALAYSIAN REPORTS

THAM KAI YAU & ORS. v. PUBLIC PROSECUTOR

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) October 18, 1976]

[Kuala Lumpur — Federal Court Criminal Appeal No. 13 of 1975]

Criminal Law and Procedure — Murder — Difference between murder and culpable homicide — Necessity to explain difference to jury.

Evidence — Evidence of boy of 14 years — Possessing sufficient intelligence to understand meaning and significance of oath — Whether a child of tender years — Corroboration.

Penal Code, ss. 34, 299, 300 & 302 — Murder — Difference between murder and culpable homicide.

In this case the appellants had been convicted of murder. One of the witnesses called at the trial was the son of the deceased, a student, then aged 13 years and 14 years at the date of the trial. The learned trial judge held that he understood the nature and meaning of the oath and allowed him to give evidence on affirmation. The evidence in the case showed that the appellants attacked the deceased and did intend to cause bodily harm to the deceased. But the distinction between murder and culpable homicide not amounting to murder was not put clearly to the jury in such a way that they would be able to come to a correct conclusion.

Held: (1) in this case the learned judge did not consider the son a child of tender years and he was satisfied that he possessed sufficient intelligence to understand the meaning and significance of an oath. A warning that it would be dangerous to convict on the uncorroborated evidence of a child of tender years was not necessary in cases involving child evidence and in any case there was in fact substantive corroboration of the boy's evidence in this case;

(2) a case such as the present would fall within the second part of section 299 or the third clause of section 300 of the Penal Code. Speaking generally, if the act must in all probability cause death the offence is murder within section 300 of the Penal Code and if the act is only likely to cause death, the offence falls within section 299 of the Penal Code. In view of the medical evidence in this case the case might not unreasonably have fallen within the lesser offence of culpable homicide not amounting to murder falling within the first part of section 304 of the Penal Code and therefore the conviction for murder must be set aside and a conviction for culpable homicide not amounting to murder substituted for it.

Case referred to:-

(1) *Lee Choon Huat* v. *Public Prosecutor* [1971] 2 M.L.J. 167.

FEDERAL COURT.

Edmund Yong Joon Hong for the appellants.

Abdul Malik bin Mohamed Salleh (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah F.J. (delivering the judgment of the Court): The appellants were charged with murder under section 302, read with section 34, Penal Code and after a trial extending over fifteen days they were convicted on that charge and sentenced to death.

The incident giving rise to this case took place at about 9.00 a.m. on April 9, 1974 at the New Market, in the Old Town of Petaling Jaya. However, two days before that date there was an altercation between the deceased and appellant 1 and his brother who kept a pork stall opposite that of deceased, a pork-seller by profession, resulting in deceased assaulting both of them. A police report was lodged by appel-